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IN THE

Supreme Court of the United States

October Term, 1953

No. 756

S. JACOB SENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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S. JACOB SENS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 13, 1954 (R. 161) based on an order of said Court filed on April 13, 1954 (R. 161), affirming without opinion the judgment and decision of the United States District Court for the Northern District of Ohio, Eastern Division.

The order of the Court of Appeals is not officially reported but appears at page 16 of the appendix, *infra* and at page 161 of the record.

The decision and judgment of the District Court is not reported but appears at page 79a of the record.

JURISDICTION

The order was filed on April 13, 1954 (R. 161) and the judgment of the court below was entered on April 13, 1954 (R. 161). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The petitioner was indicted under Section 145(b) of the Internal Revenue Code and United States Code for willfully and knowingly attempting to defeat and evade payment of the income tax due and owing by him to the United States of America for the calendar year 1945 (R. 11a).

The indictment was *not* based upon the filing of a false and fraudulent return for the year 1945 for the United States contends that *no* return was filed. The indictment was based on the alleged *willful* failure of the petitioner to file a return for the year 1945, plus certain acts of omission and commission which the indictment did not allege to have been willful (R. 11a).

In ruling on appellant's requested charges to the Jury, the District Court held that a willful failure to file was not an essential element of the crime charged (R. 56a).

This petition therefore presents the following questions:

1. Whether a *willful* failure to file a return for the year 1945 was an essential element of the crime charged in the indictment.

2. Whether on March 13, 1952, the date of the filing of a complaint against petitioner, the six year statute of limitations prescribed by Section 3748 of the Internal Revenue Code had expired with respect to the acts of omission and commission alleged to have occurred during the year 1945.

STATUTES INVOLVED

Section 145 of the Internal Revenue Code provides:

> "(a) Failure to File Returns, Submit Information, or Pay Tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.
>
> "(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

* * * *

Section 3748 of the Internal Revenue Code in so far as is here material provides:

"PERIODS OF LIMITATION.

"(a) Criminal Prosecutions.—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

"(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

"(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

"(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, or a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

Section 145 of the Internal Revenue Code may also be found at page 17 of Appendix, infra.

Section 3748 of the Internal Revenue Code may be found at page 18 of Appendix, infra.

STATEMENT OF THE CASE

On March 13, 1952 a complaint was issued against S. Jacob Sens, the petitioner, alleging a violation by him of Section 145(b), Internal Revenue Code; Section 145(b), Title 26, United States Code. (App. p. 19).

Warrant of Arrest was issued March 13, 1952 (R. 6a & 7a).

Thereafter, on April 23, 1952, the petitioner was indicted for the violation of Section 145(b), Internal Revenue Code; Section 145(b), Title 26, United States Code. The indictment contained two counts involving the calendar years 1945 and 1946 (R. 11a). Subsequently, at the time of the trial and on motion of the United States Attorney, the Court dismissed Count Two of the indictment (R. 21a).

Count One of the indictment read as follows (R. 11a):

> "The Grand Jury Charges:
>
> "That on or about March 15, 1946, in the Eastern Division of the Northern District of Ohio, S. JACOB SENS, late of Lorain, Ohio, did wilfully and knowingly attempt to defeat and evade payment of the income tax due and owing by him to the United States of America for the calendar year 1945, by his failure to keep proper records of his business transactions during the calendar year 1945; by his failure to record and report brokerage commissions received by him and salaries received by him during the calendar year 1945; by his failure to properly record sales made by him during the calendar year 1945; by having bank accounts in various cities, to wit, Lorain, Ohio, Cleveland, Ohio and New York City, during the calendar year 1945; by having a bank account under the fictitious name of 'J. Miller' with the Morris Plan Bank, Cleveland, Ohio, during the calendar year 1945, and by effecting withdrawals from that account in the amount of $15,000.00 with which he purchased $15,000.00 of United States Treasury coupon bonds under the fictitious name of 'J. Miller'; and by his further wilful failure to file an income tax return for the calendar year 1945 with the Collector of Internal Revenue for the 18th Internal Revenue Collection District of Ohio, at Cleveland, Ohio, or any other proper officer of the United States of America, as required by law, although he had received in excess of the amount of $600.00 in gross income required for

the filing of a personal income tax return, his net income for the said calendar year, as he then and there well knew, being $100,919.83, upon which said net income he owed to the United States of America an income tax of $68,957.84; in violation of Section 145(b), Internal Revenue Code; Section 145(b), Title 26, United States Code."

Trial under Count One of the indictment was commenced on May 11, 1953 and was concluded on May 20, 1953, on which date the Jury returned a verdict of "guilty" and judgment was entered (R. 79a).

The petitioner, in writing, requested the District Court to charge the Jury as follows (R. 49a):

Request No. 1

"To convict the defendant under the charge in the indictment you must first determine beyond a reasonable doubt that the defendant failed to file a federal income tax return for the calendar year 1945.

"You must not only find that the defendant, beyond a reasonable doubt, failed to file a federal income tax return for the calendar year 1945 but you must also find that the defendant willfully and with intent not to file a tax return and with the willful intent to evade federal income tax, failed to file a federal income tax return for the calendar year 1945."

Request No. 3

(R. 50a)

* * * *

"In order to convict the defendant of the charge in Count One of the indictment, you must not only find beyond a reasonable doubt that the defendant willfully failed to file a federal income tax return for the year 1945 but you must also find beyond a reasonable doubt that the defendant willfully committed the alleged acts of commission for the purpose of and with the willful intent of evading federal income tax for the calendar year 1945."

Request No. 4

(R. 50a)

"You are instructed that of the acts of commission alleged under Count One of the indictment, the following are acts of omission and not of commission and should not be considered by you as acts of commission:

"The defendant's alleged failure to keep proper records of his business transactions during the calendar year 1945;

"His alleged failure to record and report brokerage commissions received by him and salary received by him during the calendar year 1945; and

"His alleged failure to properly record sales made by him during the year 1945."

The Court refused petitioner's requested charges Nos. 1 and 4 (R. 56a). The Court also refused that part of requested charge No. 3, reading as follows (R. 56a):

"In order to convict the defendant of the charge in Count One of the indictment, you must * * * find beyond a reasonable doubt that the defendant willfully failed to file a federal income tax return for the year 1945 * * *" (R. 50a and 56a)

In ruling on the requested charges the Court said (R. 56a):

"I am glad you called that to my attention. That part of the charge will not be given for the reason I have indicated already, that the willful failure to file is not an essential element of the crime charged, and the failure to establish beyond a reasonable doubt that the defendant willfully failed to file a return would not be fatal to the Government's claim if it were otherwise established."

The petitioner took proper exceptions to his requested charges refused by the Court (R. 59a).

The Court instructed the Jury in part as follows (R. 63a):

• • • •

"However, if you find that defendant's failure to file an income tax return for 1945 was a negligent, rather than a willful omission by him this would not serve to exculpate him from the charge of willfully attempting to evade and defeat the tax, if you also find beyond a reasonable doubt that the defendant by other acts charged in the indictment did engage in an affirmative course of conduct that constituted a wilful attempt to evade or defeat the tax.".

• • • •

Proper exception was taken to that portion of the Court's charge to the Jury (R. 75a).

Petitioner filed a motion in arrest of judgment (R. 78a) and a motion for a new trial (R. 79a). These motions were overruled by the Court (R. 81a).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit from the Judgment of the District Court.

The Court of Appeals, on April 13, 1954, entered an order, without opinion (affirming the judgment of the District Court (R. 161-162, App. p. 16).

SPECIFICATION OF ERRORS

The Honorable Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court.

2. In affirming the District Court in ruling that a *willful* failure to file a tax return for the year 1945 was not an essential element of the crime charged and in refusing appellant's requested charges to the Jury Nos. 1, 3 and 4.

3. By approving and affirming the following charge of the District Court to the Jury:

"However, if you find that defendants failure to file an income tax return for 1945 was a negligent, rather than a willful omission by him, this would not serve to exculpate him from the charge of willfully attempting to evade and defeat the tax, if you also find beyond a reasonable doubt that the defendant by other acts charged in the indictment did engage in an affirmative course of conduct that constituted a willful attempt to evade or defeat the tax." (R. 63a)

REASONS FOR GRANTING THE WRIT

The ruling and decision of the District Court, affirmed by the Court of Appeals, that "willful failure to file is not an essential element of the crime charged" (R. 56a) does not follow and is contrary to the decision of this Court in *Spies v. United States,* 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418. This ruling of the trial court was the basis of the Court's refusal to give petitioner's requested charges—that to convict the defendant the Jury must find that the defendant willfully failed to file a return for the year 1945 (R. 56a), requested charges 1 and 3 (R. 49a & 50a). It was also the basis of the District Court's charge (also approved by the Court of Appeals) that "if you find that defendant's failure to file an income tax return for 1945 was a negligent rather than a willful omission by him this would not serve to exculpate him from the charge of willfully attempting to evade and defeat the tax, if you also find beyond a reasonable doubt that the defendant by other acts charged in the indictment did engage in an affirmative course of conduct that constituted a willful attempt to evade or defeat the tax" (R. 63a).

In *Spies v. United States,* supra, this Court held that:

1. The willful failure to make a return, keep records, or supply information when required, is a misdemeanor under Section 145(a) of the Internal Revenue Code.

2. Willful acts of commission plus the willful omissions that make up the list of misdemeanors may lift the misdemeanor to the degree of felony.

3. The failure to file a return or pay the tax must be willful as well as the acts of commission to constitute a felony under Section 145(b) of the Internal Revenue Code.

This Court said:

• • • •

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

• • • •

This Court definitely held, that to constitute the offense, failure to file a return must be willful, not negligent.

This Court further said:

• • • •

"• • • We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission *in addition to the willful omissions that make up the list of misdemeanors.* Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony. (Emphasis supplied.)

• • • •

"• • • If on proper submission the jury found these acts, *taken together with willful failure to file a return* and willful failure to pay the tax, to constitute a willful attempt to evade or defeat the tax, we would consider conviction of a felony sustainable. But we think a defendant is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade the tax from some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference, the defendant should be acquitted." (Emphasis supplied.)

• • • •

Accordingly we think that under the decision of this Court in *Spies v. United States,* supra, that the Court of Appeals clearly erred in affirming the decision of the District Court that a willful failure to file a return was not an essential element of the crime charged.

Also in *United States v. Murdock,* 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381, this Court declared:

• • • •

"• • • He whose conduct is defined as criminal is one who *'willfully'* fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. • • • And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is es-

sential to the offense of failing to supply information."

• • • •

The decision of this Court in *Spies v. United States* has been interpreted by the United States Court of Appeals for the Eighth Circuit in the following cases: *Cave v. United States,* 159 F. (2d) 464; *First Trust and Savings Bank of Davenport, Iowa, Administrator of the Estate of Henry A. Kraftmeyer, Deceased v. United States,* 206 F. (2d) 97.

In the *Kraftmeyer* case, the Court declared:

• • • •

"But although this case comes to us as one of first impression with no cited precedent to support the judgment so far as the identical issue is concerned, the teaching of the opinions that have been handed down with controlling authority in criminal cases establishes that in the 'structure of civil and criminal sanctions' which Congress has provided for collection of income taxes, the 'wilful failure' to file returns by the taxpayer in this case must be held to fall in the category of lesser civil derelictions calling for the smaller 'addition to tax' as well as constituting a minor and not a major criminal offense. The applicable principles were clearly defined by the Supreme Court in Spies v. United States, 317 U. S. 492 and in the opinion of this court in Cave v. United States, 159 F. 2d 464.

• • • •

"• • • It held that the wilful failure of Spies to file return and wilful failure to pay tax was not enough to justify convicting him of what the Congress evidently considered the graver offense against the revenues—of attempting to evade a tax. To consummate that graver offense the court declared that 'Congress intended some wilful commission in addition to the wilful omissions that make up the list of misdemeanors (wilful failure to file return, etc.).'"

• • • •

The Court of Appeals for the Eighth Circuit emphasized that there must be a willful failure to file a return or pay the tax to constitute even a misdemeanor or a felony when there are willful acts of commission in addition to the willful omission to file a return or pay the tax.

We think, that the decision of the court below in affirming the ruling of the District Court (that willful failure to file is not an essential element of the crime charged) is squarely in conflict with the *Cave* and *Kraftmeyer* cases cited above.

In *Arnold v. United States*, 75 F. (2d) 144, the United States Court of Appeals for the Ninth Circuit held that mere failure to file a return did not constitute an offense unless such failure was willful, since willfulness is an essential element of such crime. The Court said:

• • • •

> "When did the statute of limitations begin to run? It is clear that the mere failure to file a return on the 15th of March did not constitute an offense, unless such failure was willful. Willfulness is an essential element of the crime with which the appellant was charged. Revenue Act 1928, Section 146, 45 Stat. 835 (26 USCA Section 2146); Hargrove v. U. S. (C.C.A.) 67 F. (2d) 820, 823, 90 A.L.R. 1276; U. S. v. McCormick (C.C.A.) 67 F. (2d) 867; U.S. v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 225, 78 L. Ed. 381."

• • • •

Here again the decision of the court below is in conflict with the decision of the Ninth Circuit Court of Appeals in *Arnold v. United States*, supra.

The indictment (R. 11a) in this case charged that the offense was committed on or about March 15, 1946, the date the return was due to be filed. If there was an

offense it was therefore committed on the date the return was due and not filed and, as pointed out above, there must have been a "willful" failure to file to constitute an offense. The acts of commission and omission alleged in the indictment were barred for prosecution by the six year statute of limitations prescribed in Section 3748 of the Internal Revenue Code (App. p. 18). The acts were alleged to have taken place during the year 1945 and were barred by the statute for prosecution on January 1, 1952. The complaint was issued on March 13, 1952 and the indictment on April 23, 1952 (R. 11a).

The crime, if any, was not completed until March 15, 1946 (due date of return) and then only if there had been a willful failure to file the required d cument, an income tax return. *United States v. Lombaro* 251 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897; *Rumely v. Carthy*, 250 U.S. 293, 39 S. Ct. 483, 486, 63 L. Ed. 98; *Bowles v. United States*, 73 F. (2d) 772 (CCA 4); *Reass v. United States*, 99 F. (2d) 752 (CCA 4); *Wampler v. Snyder*, 62 App. D.C. 215, 66 F. (2d) 195; *United States ex rel. Wampler v. Hill, Warden*, 8 F. Supp. 469, affirmed 74 F. (2d) 940 (CCA 3); *Kirsch v. United States*, 174 F. (2d) 595 (CCA 8); *Cave v. United States*, 159 F. (2d) 464 (CCA 8), certiorari denied 331 U.S. 847.

Counsel for petitioner, after most diligent research, cannot find a single case which will support the decision of the court below in affirming the District Court on the proposition that a willful failure to file a return was not an essential element of the crime charged.

CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for a writ of certiorari to set at rest the important Federal questions and issues of law involved herein.

Respectfully submitted,

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Counsel for Petitioner.

CERTIFICATE

I hereby certify that I have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE.

APPENDIX

In the United States Court of Appeals
for the Sixth Circuit

No. 12,060

S. JACOB SENS, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

ORDER—Filed April 13, 1954

Before Allen, McAllister and Ford, JJ.

This case came on to be heard upon the record and briefs and oral argument of counsel;

And it appearing that the complaint was valid and charged a felony violation under 26 U.S.C. § 145(b), and that the indictment charged the same offenses charged in the complaint;

And it appearing that the filing of the complaint tolled the statute of limitations so that the indictment was not barred, 26 U.S.C., § 3748;

And it appearing that the indictment in addition to willful failure to file a return charged that appellant during the taxable year performed various acts which constituted evidence of an affirmative, willful attempt to evade or defeat the payment of the tax, and the jury found appellant guilty of a violation of 26 U.S.C., § 145 (b);

And it appearing that the court pointed out to the jury the necessity for an inference of willful attempt to defeat or evade the tax from some proof in the case other than that necessary to make out the misdemeanor of willful failure to file return, *Spies v. United States,* 317 U.S. 492, 492;

And it appearing that the court correctly instructed the

jury that the government must establish beyond a reasonable doubt that appellant engaged in conduct that constituted an affirmative, willful attempt to evade or defeat the payment of the tax for the taxable year;

And it appearing that reversible error was not shown in the admission of evidence, in the refusal of requests to charge, nor in the charge as given, and no reversible error being presented:

It is ordered that the judgment be and it hereby is affirmed.

Approved for entry:

(S.) Florence E. Allen,
United States Circuit Judge.

Section 145 of the Internal Revenue Code provides:

"(a) Failure to File Returns, Submit Information, or Pay Tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

"(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in

any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

• • • •

Section 3748 of the Internal Revenue Code provides:

"PERIODS OF LIMITATION.

"(a) Criminal Prosecutions.—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

"(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

"(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

"(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, or a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

"For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U.S.C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such pro-

ceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

"(b) Scope of Limitations.—Subsection (a) of this section shall apply to offenses whenever committed; except that it shall not apply to offenses the prosecution of which was barred before June 6, 1932."

• • • •

"COMPLAINT FOR VIOLATION OF U. S. C. TITLE 26 SECTION 145(b).

The undersigned complainant being duly sworn states:

That on or about March 15, 1946, in the Eastern Division of the Northern District of Ohio, S. Jacob Sens, late of Lorain, Ohio, did wilfully and knowingly attempt to defeat and evade payment of the income tax due and owing by him to the United States of America for the calendar year 1945, by his failure to keep proper records of his various business transactions; by his failure to report brokerage commissions and salaries received during the calendar year 1945; by having bank accounts under different names; by purchasing Government bonds under spurious names; and by his failure to file an income tax return for the calendar year 1945, although he had received in excess of the amount of $600 00 in gross income required for the filing of a personal income tax return, his net income for the said calendar year as he then and there well knew, being $100,919.83, upon which said net income he owed to the United States of America an income tax of $68,957.84; and that pursuant to a plan and scheme to defraud the United States of America of the aforestated taxes then due and owing it, said S. Jacob Sens wilfully failed to file any income tax return with the Collector of Internal Revenue for the 18th Internal Revenue Collection District of Ohio, at Cleveland, or any

other proper officer of the United States of America, as required by law. In violation of Section 145(b), Internal Revenue Code; Section 145(b), Title 26, United States Code.
AMF.

And the complainant further states that he believes that .....
are material witnesses in relation to this charge.

F. LEO BAUMGARDNER,
Special Agent, B. I. R.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 756

S. JACOB SENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* order of the Court of Appeals affirming the judgment of the district court (R. 161–162) has not been reported.

JURISDICTION

The order of the Court of Appeals was filed on April 13, 1954. The petition for a writ of certiorari was filed on May 12, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

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QUESTIONS PRESENTED

1. Whether it was necessary in this case for the Government to prove a wilful failure to file an income tax return.

2. Whether the prosecution was barred by the statute of limitations.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 56. PAYMENT OF TAX.
>
> (a) *Time of payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.
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> (d) *Voluntary advance payment.*—A tax imposed by this chapter, or any installment thereof, may be paid, at the election of the taxpayer, prior to the date prescribed for its payment.
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> (26 U. S. C. 1946 ed., Sec. 56.)
>
> SEC. 145. PENALTIES.
>
> (a) [As amended by Sec. 5 (c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] *Failure to file returns, submit information, or pay tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regula-

tions made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

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(26 U. S. C. 1946 ed., Sec. 145.)

SEC. 3748. PERIODS OF LIMITATION.

(a) *Criminal Prosecutions.*—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limi-

tation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

(b) *Scope of Limitations.*—Subsection (a) of this section shall apply to offenses whenever committed; except that it shall not apply to offenses the prosecution of which was barred before June 6, 1932.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3748.)

STATEMENT

On March 13, 1952, a complaint was filed against petitioner before a United States Commissioner charging him with wilful attempt to evade and defeat his income tax for the year 1945. (R. 1a, Pet. 19–20.) On April 23, 1952, a two count indictment was filed against petitioner in the United States District Court for the Northern District of Ohio charging him with wilful attempt to evade and defeat his income taxes for the years 1945 and 1946. (R. 11a–12a.) Upon motion of the United States Attorney, the 1946 count was thereafter dismissed. (R. 12a,

21a.) The 1945 count of the indictment alleged that petitioner attempted to defeat and evade his income taxes for 1945 by his failure to keep proper records of his business transactions during the calendar year 1945; by his failure to record and report brokerage commissions received by him and salaries received by him during the calendar year 1945; by his failure to properly record sales made by him during the calendar year 1945; by having bank accounts in various cities, to-wit, Lorain, Ohio, Cleveland, Ohio, and New York City, during the calendar year 1945; by having a bank account under the fictitious name of "J. Miller" with the Morris Plan Bank, Cleveland, Ohio, during the calendar year 1945, and by effecting withdrawals from that account in the amount of $15,000 with which he purchased $15,000 of United States Treasury coupon bonds under the fictitious name of "J. Miller"; and by his further wilful failure to file an income tax return for the calendar year 1945 although he had received net income in the sum of $100,919.83 upon which he owed an income tax of $68,957.84. (R. 11a.) After a jury trial lasting eight days, petitioner was found guilty (R. 77a), and on May 20, 1953, he was sentenced to imprisonment for two years and fined $3,000 (R. 79a). The Court of Appeals affirmed. (R. 161.)

The evidence to support the verdict may be summarized as follows:

During the entire course of the special agent's investigation commencing in 1947, petitioner was frequently asked whether he had any records and to produce what records he had. (R. 122). Not receiving any records from petitioner, the special agent proceeded to determine petitioner's net income by independent means. The special agent's analysis of certain bank accounts showed petitioner's total deposits in 1945, minus non-income items, to have been $333,130.43. (R. 123–124.) To determine the amount of petitioner's purchases, the special agent circularized all sugar refining companies and brokers located in Chicago, Cleveland and New York. Whenever leads were obtained, he contacted the persons involved and elicited information as to purchases made by petitioner. (R. 122.) In 1950 petitioner turned over to the special agent some of his cancelled checks for 1945. (R. 122.) From the information thus obtained the special agent determined that petitioner's purchases in 1945 amounted to $207,499.39. (R. 122–125.) After credit for miscellaneous expenses of $2,368.82, petitioner's net income was computed to be $101,419.83. (R. 125.) Not until the trial did petitioner produce a cash receipts and disbursements journal, nor was the special agent even aware of its existence until that time. (R. 129, 144.)

Much of the evidence at the trial involved petitioner's use of names other than his own. At one bank he applied for and received under the

name of "Clarence Behrendt" bonds costing $15,008.16. (R. 86–90.) Under the fictitious name of "J. Miller" he maintained a bank account from which he withdrew funds to purchase bonds costing $15,006.12. (R. 91–95.) He used the latter bonds (R. 112, 113) as collateral for a loan at a bank where he dealt in his and his wife's name (R. 95–96). He maintained bank accounts and did business under the names of "Lorain Foods" (R. 97–98), "Erie Trading Company" (R. 104, 108–111, 114), and "William Goldberg" (R. 111). Petitioner admitted all of these matters and stated that he used the assumed name of "J. Miller" to hide his black market transactions. (R. 115–119.)

A search in the records of eight collection districts indicated that petitioner had not filed an income tax return for 1945. (R. 115.) Petitioner's accountant testified to his preparing a return showing a tax liability in the sum of $42.95 (R. 134, 135, 147) but did not testify that he filed the return (R. 147). When interviewed several times during the investigation petitioner did not exhibit any return or check stub. (R. 148.) He gave no explanation as to why there was no record of the tax return being filed. (R. 148.)

From unreported net income in the sum of $101,419.83 it was determined that petitioner owed the Government $68,957.84 as income tax for the year 1945. (R. 131, 132.)

Upon a motion for judgment of acquittal it was argued that the Government failed to prove wilful failure to file an income tax return and that this was a necessary element of the crime charged. (R. 40a.) The trial court concluded that the argument was without merit (R. 145), although it noted that there was evidence susceptible of the inference that there was a wilful failure to file a tax return (R. 147–148).

ARGUMENT

1. Petitioner contends (Pet. 6–13) that the trial court erred in holding that wilful failure to file an income tax return is not an essential element of the crime charged here. Although this is a tax evasion case, he urges that to sustain conviction the Government must prove beyond a reasonable doubt that petitioner failed to file a return and that such failure was wilful. Despite undisputed proof of affirmative acts of concealment and a very substantial tax deficiency, petitioner argues that the Government's case must fail unless it is also established that there was wilful failure to file a return.

Spies v. *United States,* 317 U. S. 492, however, holds the contrary. In that case the defendant had been convicted of attempting to defeat and evade income tax in violation of Section 145 (b), *supra,* p. 3, and the judgment of conviction was affirmed on appeal. The defendant had requested that the jury be instructed to acquit if it found

only that he had wilfully failed to make a return and had wilfully failed to pay the tax due. This was refused. This Court reversed, holding that the defendant was entitled to a charge which would (p. 500)—

> point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors.

The Court sharply distinguished between the felony of wilful tax evasion and the misdemeanor of wilful failure to file a return. It stated, *supra,* pp. 497, 499:

> A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145 (b) meant no more than the same derelictions it had just defined in § 145 (a) as a misdemeanor. * * * Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner".

Petitioner relies (Pet. 12) on *First Trust & Savings Bank* v. *United States,* 206 F. 2d 97 (C. A. 8th); but in that case it was found that the evidence did not show any affirmative acts of concealment. Petitioner also cites (Pet. 12) *Cave* v. *United States,* 159 F. 2d 464 (C. A. 8th), certiorari denied, 331 U. S. 847. In that case the Court of Appeals held that the indictment sufficiently charged an attempt to defeat and evade the tax through wilfully filing a false and fraudulent return. Proof of the 145 (a) misdemeanor together with affirmative acts of tax evasion, may constitute the basis for conviction under Section 145 (b). *Spies* v. *United States, supra; United States* v. *Smith,* 206 F. 2d 905 (C. A. 3d); *United States* v. *Croessant,* 178 F. 2d 96 (C. A. 3d); *Cave* v. *United States,* 159 F. 2d 464 (C. A. 8th), certiorari denied, 331 U. S. 847. It does not follow, however, that proof of tax evasion under 145 (b) cannot be made unless there is a showing of wilful failure to file a return.

2. Petitioner contends (Pet. 13–14) that the complaint filed on March 13, 1952, was barred by the statute of limitations, because the period began to run on January 1, 1946.

This argument is without merit. It ignores the fact that petitioner's income tax, while payable in advance if he chose to pay it, did not become due until March 15, 1946, and did not become deficient or actionable until the latter

duce. Section 56 (a) and (d), *supra*, p. 2. The Government must prove not only an attempt to willfully defraud it but also that a tax in addition to what the taxpayer had already paid, if any, remains due and owing. *United States* v. *Mazzei*, 176 F. 2d 328, 329 (C. A. 7th), certiorari denied, 338 U. S. 893; *Gleichman* v. *United States*, 80 F. 2d 398, 399 (C. A. 8), certiorari denied, 297 U. S. 709. The statute of limitations does not begin to run until the right to prosecute the action to a successful conclusion has completely accrued. *Arnold* v. *United States*, 75 F. 2d 249 (C. A. 9th); *Bowles* v. *United States*, 73 F. 2d 772 (C. A. 4th), certiorari denied, 296 U. S. 650.

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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